Supreme Court No. 80115-1

THE SUPREME COURT
OF THE STATE OF WASHINGTON

THURSTON COUNTY,
Petitioner,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD and FUTUREWISE
(formerly known as 1000 Friends of Washington),
Respondents,

&

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, OLYMPIA MASTER BUILDERS, and PEOPLE FOR RESPONSIBLE ENVIRONMENTAL POLICIES,
Petitioner-Intervenors.

FUTUREWISE'S ANSWER TO CLALLAM COUNTY'S MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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I. Introduction

Clallam County's Memorandum in Support of Petition for Review (Clallam County's Memorandum) takes a static view of county obligations under the Growth Management Act (GMA) that, as the Washington State Supreme Court has recognized, is inconsistent with the GMA:

> Instead, a far more reasonable way to read the statutory schema as a whole is that the process creates (hopefully) ever improving management of growth, in light of all of the different legitimate concerns of the stakeholders in the system. Nor do we find any evidence of legislative intent to treat the original comprehensive plan so differently from revised comprehensive plans. Instead, the continual process of revising management of land is itself an integral part of the structure established by the GMA.[1]

The questions raised by Clallam County's Memorandum have been largely answered by the Washington Supreme Court's *1000 Friends v. McFarland* decision. Because of this decision and the very specific facts that underlie the Board and Court decisions, Thurston County's Petition for Review does not raise issues of substantial public interest that should

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[1] *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 186, 149 P.3d 616, 627 – 28 (2006).

be determined by the Supreme Court. So the Supreme Court should not take discretionary review of the *Thurston County* decision.[2]

II. Argument

A. Thurston County's petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals decision is consistent with the plain language of RCW 36.70A.130 and the structure of the GMA.

Clallam County first argues that the Court of Appeal's *Thurston County* decision allows litigants to challenge every provision of every comprehensive plan or every development regulation every seven years. This argument ignores that the Court of Appeals correctly concluded that Futurewise had not challenged the County prior decisions, but rather Thurston County's 2004 decisions to review and revise the comprehensive plan and development regulations.[3]

Clallam County then argues that the Court of Appeal's decision is unsupported by the language of RCW 36.70A.130 and the statutory framework of the Act. As we shall see, both of these arguments fail.

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[2] *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wn. App. 781, 154 P.3d 959 (2007).
[3] *Thurston County,* 137 Wn. App. at 799, 154 P.3d at 968.

As to the first part of this argument, the county relies on just a part of RCW 36.70A.130(1), RCW 36.70A.130(1)(c). However, when RCW 36.70A.130(1)(a) and (c) are read together a different picture emerges. Here is the full text of these two parts of the subsection:

> (1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.
>
> ....
>
> (c) The review and evaluation required by this subsection may be combined with the review required by subsection (3) of this section. The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.

So RCW 36.70A.130(1)(a) provides that "a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section." This covers all of

the comprehensive plan and development regulations, not just those provisions a county or city chooses to update nor just the parts of the comprehensive plan or development regulations affected by amendments to the GMA.

RCW 36.70A.130(1)(c), the part relied upon by Clallam County, is consistent with this construction. That subsection does two things. First, it provides that the "review and evaluation" required by RCW 36.70A.130(1) may be combined with the ten-year urban growth area evaluation required by RCW 36.70A.130(3). Second, the review and evaluation required by RCW 36.70A.130(1) "shall include, but is not limited to, consideration of critical area ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management." Thus, at a minimum, critical area ordinances and population allocations must be analyzed during the RCW 36.70A.130(1) review. But RCW 36.70A.130(1)(c) allows and RCW 36.70A.130(1)(a) requires review of the entire comprehensive plan and development regulations. Reading RCW 36.70A.130(1) as a whole, as Clallam County failed to do, shows that the Court of Appeals' *Thurston County* decision is well grounded in the specific language of RCW 36.70A.130(1).

The second part of Clallam County's argument, that the decision is unsupported by the statutory framework of the GMA, has already been rejected by the Washington State Supreme Court:

> ¶ 49 We turn, as we must, to the statutory schema as a whole. Read in context, RCW 36.70A.130 requires that counties continuously review, evaluate, and revise their comprehensive plans in light of the best available science, the experience of the county with the current regulations, the input of the population, and the ever changing needs and realities of the use of land.[4]

Rather than directly addressing this conclusion, although Clallam County quotes *1000 Friends of Washington v. McFarland* when it suits its purposes, the county argues that other GMA amendments suggest that the review process was intended as a means to cause local governments to address new statutory provisions or new information. This effort is unconvincing for two reasons. First, none of the provisions cited by Clallam County indicate that the update is limited to provisions that are amended or only to new information. For example, RCW 36.70A.070(9) provides that "[i]t is the intent that new or amended elements required after January 1, 2002, be adopted concurrent with the scheduled update provided in RCW 36.70A.130." This language does not say that it is

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[4] *1000 Friends of Washington v. McFarland*, 159 Wn.2d at 186, 149 P.3d at 627.

limited to new elements or new amendments. Contrary to Clallam County's argument, there is no limiting theme here. "Concurrent" is not a word of limitation.

Second, the legislature did not limit RCW 36.70A.130's review and revise updates to new statutory provisions because the GMA requires an internally consistent comprehensive plan.[5] The piecemeal updates advocated by Clallam County will undermine the comprehensive, internally consistent nature of a comprehensive plan.

Clallam County then contends that the Court of Appeals' *Thurston County* decision will "unleash a flood of GMA petitions." However, if a county or city properly reviews and updates its comprehensive plan and development regulations by the deadline, the possibility of an appeal will be greatly reduced and the chance that the appeal will succeed is all but eliminated.

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[5] RCW 36.70A.070; *City of Des Moines v. Puget Sound Regional Council*, 97 Wn. App. 920, 931, 988 P.2d 993, 1000 (1999).

2. The Court of Appeals' *Thurston County* decision will not undermine the GMA, rather it will allow GMA comprehensive plans and development regulations to be updated to fit the 21st century.

Clallam County first sets out the GMA planning framework. But the county's framework totally ignores the requirement to review and if necessary update comprehensive plans and development regulations shown above. The GMA was originally adopted in 1990.[6] The GMA has been amended every year since then, in part to adapt to changing circumstances.[7] GMA comprehensive plans and development regulations must also be updated to reflect changing circumstances.[8]

Clallam County then points to the requirement that appeals of comprehensive plans and development regulations must be filed within 60 days. But nothing in the *Thurston County* decision undermines this requirement. Appeals of county decisions to review and revise comprehensive plans under RCW 36.70A.130 must still be filed within 60 days.[9] If an appeal is filed, it must be decided in 180 days.[10] So these

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[6] *1000 Friends of Washington v. McFarland*, 159 Wn.2d at 169, 149 P.3d at 619.
[7] *Id.* at 181 – 82, 149 P.3d at 625. *and see for example* Laws of 1991, ch. 322; Laws of 1992, ch. 207; Laws of 1993, Sp. Sess., ch. 6; Laws of 1994, ch. 249; Laws of 2007, ch. 433.
[8] Laws of 2005, ch. 294 § 1.
[9] RCW 36.70A.290(2); *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County,* 135 Wn.2d 542, 558 – 59, 958 P.2d 962, 970 (1998).

decisions reach finality quickly. This is consistent with the "general legislative policy recognized by this court that land use decisions should reach finality quickly."[11]

Clallam County then uses the example of urban growth areas to essentially argue that finality is needed for effective implementation of the GMA. This argument fails for two reasons.

First, if the urban growth area complies with the GMA, the county can count on it and it will survive any appeal. So both the county and property owners can rely on GMA compliant urban growth areas.

Second, as the Court of Appeals correctly noted:

> And while finality in land use decisions is important, by requiring review of comprehensive land use plans and development regulations every seven years, the legislature has determined that, in managing growth, the benefits to the public of keeping abreast of changes in the law outweigh the benefits of finality to landowners. In the purpose statement for an amendment authorizing more time for counties to complete updates, the legislature recognized that the update requirement involves significant compliance efforts by local governments, but added that it is "an acknowledgement of the continual changes that occur within the state, and the need to ensure that land use

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[10] RCW 36.70A.300(2)(a).
[11] *1000 Friends of Washington v. McFarland*, 159 Wn.2d at 180, 149 P.3d at 624 – 25.

> measures reflect the collective wishes of its citizenry." H.B. 2171, 59TH LEG., Reg. Sess. § 1 (Wash.2005).[12]

So finality is important, but the legislature has concluded that updating urban growth areas and other provisions of comprehensive plans to keep up with the state's rapid growth and to address problems that are becoming more severe, such as addressing the need for more affordable housing, is more important. The Washington Supreme Court has recognized the value of citizen appeals under the GMA statutory scheme.[13] Filing an appeal against a county or city that has not properly reviewed and revised its comprehensive plans and development regulations is not "antithetical to the GMA" as Clallam County contends. Rather, it is an important part of the update process, a process that the Washington Supreme Court has concluded aims to create "ever improving management of growth."[14]

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[12] *Thurston County,* 137 Wn. App. at 794 – 95, 154 P.3d at 965.
[13] *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 176, 979 P.2d 374, 380 – 82 (1999).
[14] *1000 Friends of Washington v. McFarland*, 159 Wn.2d at 186, 149 P.3d at 627 – 28.

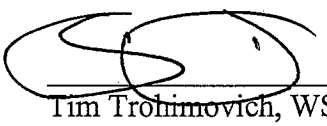
B. The Court of Appeal's *Thurston County* decision does not conflict with the decisions of the Supreme Court.

In footnote 1, Clallam County's Memorandum adopts the argument from Thurston County's Petition for Review that the Court of Appeals' *Thurston County* decision conflicts with other decisions of the Washington Supreme Court. As we showed on pages 16 through 19 of Futurewise's Answer to Thurston County's Petition for Discretionary Review, the *Thurston County* decision does not conflict with any decision of the Supreme Court identified by Thurston County. Further, as this Answer shows, it is also consistent with *1000 Friends of Washington v. McFarland.*

III. Conclusion

Clallam County's arguments all fail because the questions raised have been answered by *1000 Friends of Washington v. McFarland.* Further, the problems the county identified can all be resolved merely by complying with the GMA. This case simply does not qualify for review under the criteria in RAP 13.4(b).

Respectfully submitted July 26, 2007



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